No. 92-63

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

FRONTIER PILOTS LITIGATION STEERING COMMITTEE, INC.,
Petitioner,

v.

CONTINENTAL AIRLINES, INC., CONTINENTAL PILOTS MERGER COMMITTEE, PEOPLE EXPRESS PILOTS MERGER COMMITTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 10, 1992

QUESTIONS PRESENTED

1. Where a group of employees represented by petitioner agreed to and received a "final and binding" arbitration that integrated them into the seniority list of an acquiring company's employees, did the court of appeals correctly affirm the district court's order precluding them from collaterally challenging the result of that arbitration in a second arbitration convened to integrate the seniority of another group of employees acquired as part of the same transaction?

2. Following the close of evidence in a lengthy arbitration, where the arbitrator briefly met with one party in full view of the other parties and did not discuss any pending issues, and the district court found as fact that the meeting did not prejudice petitioner, did the court of appeals correctly affirm the district court's confirmation of the arbitrator's award where petitioner failed to show that the district court's fact finding was clearly erroneous and instead petitioner sought a *per se* rule requiring vacation of arbitration awards issued after *ex parte* contacts?

PARTIES TO THE PROCEEDING

The petition for certiorari (page iv) correctly identifies four of the parties to the proceeding in the court of appeals. However, the caption of the case in the court of appeals included additional appellees: Texas Air Corp.; People Express Airlines, Inc.; and People Express, Inc. As of July 11, 1989, People Express Airlines, Inc. and People Express, Inc. ceased to exist; respondent Continental Airlines, Inc. is their successor in interest. As of June 6, 1990, respondent Texas Air Corp. was renamed Continental Airlines Holdings, Inc.

The petition for certiorari (page iv, fn. 2) correctly states that Frank T. Shanley, whose name appears in the caption of the judgment order issued by the court of appeals, was replaced by, and is represented by, the Continental Pilots Merger Committee. In fact, all of the individual persons whose names appear in that caption[1] were replaced by, and are represented by, the Continental Pilots Merger Committee.

The following information is provided pursuant to Rule 29.1 of this Court's Rules. Respondent Continental Airlines Holdings, Inc. is a publicly held corporation and is the holding company of numerous privately held affiliates and subsidiaries, including several airlines of which Continental Airlines, Inc. is one. Continental Airlines Holdings, Inc. owns 50% of TAC/SAS Quality Service Institute, Inc.; the remainder is held by Scandinavian Airlines System. Continental Airlines, Inc. owns 50% of Continental-Eastern Sales, Inc. ("CESI"); the remainder is held by Eastern Air Lines, Inc.

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[1]Gary Armentrout, Bill Autrey, R.S. Broadwater, John Campbell, Andy Cashetta, Stan Challgren, C.P. Conrady, Brian Craven, H.A. Cooper, John Gaylord, Don Gentry, John Giacchi, Larry Green, David Heekin, Charlie Higdon, Charlie Huff, Darrell Johnston, Alan King, H.F. Maroney, Neil A. Miller, Jim Northington, Steve Olsen, John F. Painter, Ken R. Quick, David Ross, C.A. Schepacarter, A.G. Sinibaldi, Jim Skelton, Tom E. Stephens, and Jack Stice.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental") respectfully request that this Court deny the petition for writ of certiorari submitted by petitioner Frontier Pilots Litigation Steering Committee, Inc. seeking review of the Third Circuit's unpublished judgment order in this case.

OPINIONS BELOW

The petition for a writ of certiorari (page 2 and Appendix) correctly identifies the relevant opinions and judgments delivered in the district court and the court of appeals.

JURISDICTION

The petition for a writ of certiorari (page 3) correctly identifies a basis for invoking this Court's jurisdiction.

STATEMENT OF THE CASE

This case involves two arbitrations that followed Continental's acquisition of two other airlines: Frontier Airlines, Inc. ("Frontier") and People Express Airlines, Inc. ("People Express"). As part of the acquisition, the pilots at each of those two acquired airlines were given a right to arbitrate their integration into the pre-existing seniority list for pilots at Continental. The former Frontier pilots received their arbitration first under an arbitration agreement that they negotiated with Continental. When the former People Express pilots thereafter pursued their own arbitration under a different arbitration agreement, the Frontier pilots intervened and sought to use the second arbitration as a vehicle for challenging the result of their own arbitration. The district court and the court of appeals precluded the Frontier pilots from challenging the first arbitration award in the second arbitration.

1. Frontier Went Bankrupt, And Continental Expressed An Interest In Acquiring It.

Petitioner represents 270 pilots who formerly worked for Frontier[1] and who now are among the 4,158 pilots who work for Continental. Frontier was a wholly-owned subsidiary of People Express, Inc. In August, 1986, Frontier ceased all flight operations, terminated virtually all employees, and filed for bankruptcy reorganization relief in the United States Bankruptcy Court for the District of Colorado.

Shortly thereafter, Texas Air Corp. ("Texas Air"), the parent corporation of Continental, expressed an interest in purchasing the assets and stock of Frontier. Texas Air also wanted to acquire People Express, Inc.'s three operating air carriers: People Express and two other airlines. On September 15, 1986, Texas Air and People Express, Inc. entered into an Agreement and Plan of Merger to accomplish this. J.A. at 17-77.

2. The Parties Reached Agreement On Arbitration, And The Government Approved The Transaction.

Pursuant to their agreement, Texas Air and People Express, Inc. filed an application with the United States Department of Transportation seeking approval of the transaction. J.A. at 78-98. Included with that filing were two documents respectively providing for seniority integration arbitrations for the two acquisitions.

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[1]Petitioner is an incorporated organization that represents the former pilots of Frontier Airlines in litigation pursuant to powers of attorney granted by those pilots. Joint Appendix from the court of appeals at 331-32 (hereinafter cited as "J.A. at __."). The district court certified petitioner as the class representative for the former Frontier pilots in this case. J.A. at 383.

The first document providing for an arbitration was the draft Frontier-Continental Job Preservation Agreement ("JPA"), also referred to as the "Union Agreement." J.A. at 99-131. The draft JPA provided, *inter alia*, that Continental would acquire certain assets of Frontier while simultaneously extending job guarantees to former Frontier employees.[2]

The second document providing for an arbitration was the Labor Protection Agreement ("LPA"), an agreement between Texas Air and People Express, Inc.[3] J.A. at 15-16. This was the document that the district court eventually determined gave the People Express pilots a right to a seniority integration arbitration.

Commencing on September 15, 1986, Continental engaged in intense negotiations over the JPA with the Frontier pilots, their union, and their counsel. Continental and the Frontier

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[2]In pertinent part, the JPA stated:

> As soon as determined practicable by Continental, former Frontier pilots shall be merged into Continental's pilot System Seniority List pursuant to fair and equitable seniority integration procedures, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator . . . . *Said Neutral shall take special notice of the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom.*

[3]The LPA parallelled the language of the JPA, except that it did not include the language about the non-operational status of Frontier. The LPA provided in pertinent part:

> Following consummation of the aforesaid Merger Agreement, in the event of a future merger of airline operations involving any air carrier subsidiary of People Express, Inc., provision shall be made for fair and equitable seniority integration procedures, for affected employees . . ., which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a Neutral Mediator . . . .

pilots moved the JPA's seniority provisions into a separate "Side Letter No. 2," which was incorporated into the JPA. That side letter included substantially the same language for integration of the Frontier pilots that had appeared in the draft JPA filed with the Department of Transportation. The Frontier pilots then approved the JPA and Side Letter No. 2 by unanimous vote at a union-conducted meeting. J.A. at 132-51.

Thereafter, the Department of Transportation approved the transaction. J.A. at 159-70. It stated that it would not impose labor protective provisions (*i.e.*, it would not impose upon the parties any requirements relating to the integration of the acquired employees). In making that determination, the Department of Transportation cited to Frontier's cessation of operations, Texas Air's agreement to hire a significant number of Frontier employees, the Merger Agreement's clause allowing Texas Air to withdraw if the Government imposed labor protective provisions, and the likelihood that Texas Air in fact would do so. The bankruptcy court in Colorado also gave its approval to the relevant agreements, including the JPA and Side Letter No. 2. J.A. at 243, 412.

3. The First Arbitrator Integrated The Frontier Pilots Into the Continental Pilot Seniority List, And The Colorado State Courts Upheld That Award.

The Frontier Pilots thereupon selected a merger committee, as did the Continental pilots. The two committees along with Continental then executed a document specifying arbitration procedures consistent with Side Letter No. 2. The procedures document stated that the decision of the arbitrator would be "final." J.A. at 303-05.

The seniority integration dispute between the Frontier and Continental Pilots was submitted to arbitration pursuant

to the JPA, Side Letter No. 2, and the negotiated procedures document. Hearings were held before an experienced airline arbitrator, George Nicolau. On June 15, 1987, Arbitrator Nicolau rendered his 57-page final Opinion and Award ("Nicolau Award"). Arbitrator Nicolau rejected virtually all of the Frontier pilots' contentions made during that arbitration. However, despite their lack of career expectations at Frontier, Arbitrator Nicolau integrated the Frontier pilots in such a way that 162 of them were able to bid for and hold Captain positions at Continental.[4] J.A. at 171-222.

The former Frontier pilots, dissatisfied with Arbitrator Nicolau's decision, filed a petition to vacate the award in the trial level court of the State of Colorado. J.A. at 307-22. In general, they argued that the arbitration which they had received was not the "fair and equitable" arbitration which they had been guaranteed by virtue of the JPA.[5] On June 30, 1988, the state court dismissed the petition.[6] J.A. at 323.

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[4]Arbitrator Nicolau's Award included language that it had prospective effect and was to govern all future seniority list concerns between the Frontier and Continental pilots: "Following the implementation of this Integrated Seniority List, the future job bidding, status, furloughs and recall rights of Continental pilots, including former Frontier pilots, shall be determined on the basis of said List . . . ." J.A. at 219, 221.

[5]This was also the original position taken by the Frontier pilots at the time they moved to intervene in the instant litigation. It was only after they were successful in intervening that they claimed the JPA did *not* provide for the same "fair and equitable" arbitration standard specified in the LPA.

[6]The Colorado Court of Appeals affirmed. J.A. at 487. The Colorado Supreme Court denied certiorari. Petitioner's Appendix at 47a (hereinafter cited as "Pet. App. at __").

4. The Frontier Pilots Were Permitted To Intervene Into The People Express Pilots' Seniority Arbitration To Protect Their Interest In The First Award.

Following the above rulings, the Frontier pilots claimed that they feared the loss of what they had secured in the decision by Arbitrator Nicolau to the People Express pilots if the New Jersey District Court were to order an arbitration under the LPA. Thus, in October, 1988, the Frontier pilots moved to intervene in that litigation, in which the People Express pilots were seeking an arbitration to integrate People Express pilots into the Continental pilot seniority list.[7] J.A. at 324-57. The Frontier pilots explained in their moving papers that, "[w]hile *the seniority rights of the Frontier pilots at Continental were already decided in a prior arbitration proceeding*, the Frontier pilots must be represented during the Continental-People Express arbitration to protect their existing seniority rights." J.A. at 340 (emphasis supplied). At the hearing on the motion, the Frontier pilots' counsel admitted that their "primary interest [was] to protect that which was awarded [them] in arbitration in Colorado." J.A. at 360. Of particular note, their counsel admitted, "*We acknowledge the Nicolau award, which we are, by the way, trying to set aside [in the then-pending Colorado State court proceedings]. But we acknowledge it and we recognize that it is final and binding absent it being set aside.*" J.A. at 366. Based on the above representations, the district court granted the motion. J.A. at 368, 383. The district court explained its rationale as follows:

> Pursuant to an arbitration award filed in June of [1987], the Frontier pilots became fully integrated

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[7]The New Jersey litigation had been commenced by the People Express pilots on April 1, 1987. J.A. at 1. The Frontier pilots had been aware of that litigation well before their intervention. J.A. at 332.

> into the Continental pilot work force. However, the arbitrator's opinion and award is currently being challenged by the Frontier pilots in the Colorado Court of Appeals. The list established by the arbitrator remains in effect pending resolution of the appeal by the Colorado Court. The pilots now seek to intervene in this litigation *to prevent a possible change in their existing seniority status* that may result from this litigation. . . . Therefore, to ensure that the Frontier pilots' interests in this judicial proceeding are adequately represented, I will grant their motion for intervention.

J.A. at 370-74.

Following a bench trial in April, 1989, the district court granted the People Express pilots' request for arbitration. J.A. at 426-28. The district court then asked the Frontier pilots to explain why they, as fully integrated Continental pilots, should not be bound by the Nicolau Award. J.A. at 963-64. In answering that question, the Frontier pilots admitted that they "would prefer an early resolution by this [District] Court of any claim of *res judicata*. . . . [T]he Frontier pilots would prefer that this [District] Court consider the merits of any contention regarding the effect of the Nicolau Award. A prearbitration determination would be preferable from a practical standpoint." J.A. at 435-36. On August 7, 1989, the district court accomodated that request, ruling in advance of the LPA arbitration that the Frontier pilots' role was solely to preserve the Nicolau Award, the very ground upon which they had sought and been permitted to intervene. Pet. App. at 2a-3a.

5. The Second Arbitrator Declined To Rearbitrate The First Award, And He Then Heard Evidence To Integrate The People Express Pilots.

Subsequently, the Frontier pilots took the position that the LPA arbitrator had the authority to interpret the language of the August 7, 1989 order defining their role in the LPA arbitration. J.A. at 484. After Jerome H. Ross, Esq. was selected as the arbitrator, Continental took up the Frontier pilots' invitation and asked him, by way of a motion *in limine*, to rule that the Frontier pilots could not challenge the Nicolau Award in the LPA arbitration. J.A. at 617. Arbitrator Ross granted that motion, noting that the Frontier pilots had sought intervention solely to protect the results of the Nicolau Award, and that the district court had granted intervention on that ground. J.A. at 488-502. The Frontier pilots moved Arbitrator Ross to reconsider, arguing that he had committed a serious error. The Frontier pilots explained, "*The [Frontier pilots] Committee believes . . ., consistent with Third Circuit law as quoted above, that [the district court] did not intend to usurp the unique role of the arbitrator in construing or giving weight to a prior arbitration proceeding . . . .*" J.A. at 512 (emphasis supplied). Arbitrator Ross reaffirmed his prior ruling, and the district court affirmed in an interlocutory ruling. J.A. at 513-29.

The four parties presented seventy-two days of evidence to Arbitrator Ross. The transcript of the hearing is 16,725 pages long. Almost 2,000 exhibits were admitted into evidence. Counsel submitted over 1,000 pages of post-hearing briefs, followed by a day of oral argument. With the record closed, the arbitrator was faced with the task of integrating 1,061 former People Express pilots into the combined seniority list of 557 Frontier pilots, 2,286 pre-merger Continental pilots, and over 1,300 Continental pilots hired since the merger. Thus, determining *how* the list should be structured in theory was only half the problem; the arbitrator was also required to

translate his concept for a list into an array of actual names which would constitute his Award. To accomplish this formidable task, Arbitrator Ross determined that, after he had made his basic decision, he wanted a committee composed of representatives from each party to assist him in the technical aspects of drafting the list, which it was anticipated would be performed using computer runs. J.A. at 607-11; Pet. App. at 34a-44a.

6. After The Record Was Closed, The Second Arbitrator Briefly Met With A People Express Pilot To Discuss A Procedural Matter, And The Frontier Pilots Did Not Object.

After the record was closed, Arbitrator Ross met with the parties' computer specialists on seven occasions. J.A. at 618. During one such session, the People Express pilots threatened to withdraw from the computer support process. Because Arbitrator Ross had found those sessions invaluable, J.A. at 748 and 782, he requested a brief meeting with Mr. Mackenzie, Chairman of the People Express Pilot Merger Committee, to request their continued participation. J.A. at 750. The Frontier pilots were in full view of the arbitrator before he met with Mr. Mackenzie, *id.*, and they admit both that they saw the arbitrator walk into the room with Mr. Mackenzie and that they did not make any effort to participate or object. J.A. at 748, 753, 782, 794. According to both Arbitrator Ross and Mr. Mackenzie, during their fifteen- to thirty-minute conversation there was no discussion of how to integrate the People Express Captains relative to the Frontier Captains, and Mr. Mackenzie made no attempt to influence the arbitrator with regard to any other part of the seniority list. J.A. at 748-50.

7. The Second Arbitrator Issued His Award, Which Was Confirmed By The District Court And Affirmed By The Third Circuit.

On August 13, 1991, Arbitrator Ross issued his Opinion and Award ("Ross Award"). J.A. at 612-746. His explanation for his Award is 133 pages long. *Inter alia*, Arbitrator Ross noted that the Frontier pilots had chosen to preserve their jobs by signing the JPA and its Side Letter No. 2. J.A. at 726, 741. While he weighed the equities brought to Continental by the Frontier pilots, J.A. at 728, he determined that the People Express pilots were entitled to greater seniority than where Arbitrator Nicolau had placed the Frontier pilots on the Continental pilot list.[8] J.A. at 739-41. The district court affirmed this determination by an order dated November 22, 1991. J.A. at 899-900.

In the opinion that followed on November 26, 1991, the district court explained the restriction on the Frontier pilots contained in the August 7, 1989 order. The district court explained that the Nicolau Award made the Frontier pilots fully integrated Continental pilots, and that the Frontier pilots had been permitted to intervene to protect that relationship from encroachment by the People Express pilots in their arbitration before Arbitrator Ross. The district court observed that allowing the Frontier pilots to reargue their seniority relative to the Continental pilots would have constituted a "collateral attack" on the Nicolau Award in the federal courts where the Colorado State courts had refused to grant such relief on direct appeal. Pet. App. at 50a-52a.

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[8]Petitioner attributes various statements to Arbitrator Ross to the effect that he would have rendered a different award were it not for the district court's August 7, 1989 Order. Pet. at 45-46. These statements are not part of the arbitral record, but come from affidavits of the Frontier pilots and their counsel drafted after Arbitrator Ross's Award was issued. J.A. at 752-808.

The district court also rejected the Frontier pilots' argument that the *ex parte* communication with Arbitrator Ross required vacation of his Award. The district court held that, given the openness with which the arbitrator had met with Mr. Mackenzie, it was "baseless" to suggest that anything improper had occurred during their meeting. First, the district court made a factual finding that they had discussed only the People Express pilots' continued participation in the computer process. Second, the court found it "important" that the conversation took place long after the hearings were concluded and the record was closed. Finally, the court found that the discussion "clearly did not prejudice the Frontier Pilots . . . ." Pet. App. at 31a-34a.

The Frontier pilots appealed to the Third Circuit. Three days after oral argument, the court of appeals affirmed the district court by an unpublished judgment order. Pet. App. at 58a-60a. The Frontier pilots petitioned for rehearing, conceding that disposition by such orders is reserved for "only the most frivolous of cases []." The court of appeals denied the petition for rehearing in another unpublished order dated April 10, 1992. Pet. App. at 62a-63a.

REASONS FOR DENYING THE WRIT

There is nothing about this case that merits review by this Court. The Frontier pilots are not complaining here about the arbitration that they received in 1987 (indeed, the Colorado courts rejected their arguments about that arbitration, and they did not petition this Court for review). Instead, the Frontier pilots are complaining here because, after they were permitted to intervene in *someone else's* arbitration based on the same historical facts, they were not allowed to use that second arbitration to collaterally challenge the result of their own arbitration. Both the district court and the court of appeals properly declined to afford them this "second bite at the apple."

This case further presents an unusual and highly fact-specific situation unlikely to be repeated, and it therefore is not of sufficient importance to warrant review by this Court. The corporate transaction that gave rise to these issues involved the almost simultaneous acquisition by one airline of two employee workforces from other airlines. In seeking the Government's approval of the transaction, respondents filed two different arbitration documents providing for the integration of those employees into the existing seniority list on a one-time basis. The district court's order respected the one-time nature of each of those arbitration documents. The court of appeals affirmed without opinion. Accordingly, there is virtually no precedential importance to this case.[9] It is unlikely that there would be a repetition of such a situation, where an employee group received a seniority arbitration conducted pursuant to one arbitration agreement and thereafter sought to challenge the result in a seniority arbitration for another employee group conducted pursuant to another arbitration agreement.

The conflicts asserted by petitioner between the decision of the Third Circuit and decisions of this Court do not exist. As an initial matter, the Third Circuit's unpublished judgment order is incapable of creating the "conflict" argued by the petitioner. Further, the court of appeals correctly affirmed the district court, because this Court repeatedly has stated that the arbitrability determination is within the province of the court, not the arbitrator. Nor are the lower federal courts commonly departing from this precept, as asserted by petitioner.

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[9] *See* Third Circuit Internal Operating Procedures §§ 6.2.1-6.2.2 (a judgment order is used when a written opinion will have no precedential value, the district court's findings of fact are not clearly erroneous, and there is no error of law).

Finally, the *ex parte* communication issue does not present a conflict with the Ninth Circuit decision cited by petitioner, for the same reason; the Third Circuit's judgment order has no explanatory or precedential value. In any event, Third Circuit case law is consistent with the decisions of the Ninth Circuit and other lower federal courts in requiring a showing of prejudice before an arbitration award will be vacated on the basis of an *ex parte* communication with the arbitrator. The district court here made factual findings that there was no prejudice to petitioner. Nothing in the record suggests that those findings are in any way erroneous, and the circumstances do not suggest even an appearance of impropriety so as to call for an exercise of this Court's supervisory power.

I. The Arbitrability Issue Presented Is Unusual And Fact-Specific, And It Does Not Warrant Review By This Court.

This case involves an "interest arbitration," *i.e.*, a hearing to determine the respective rights of the parties rather than to interpret a contract establishing those rights. *See generally* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 98-99 (BNA 4th ed. 1985); *see also id.* at 98-107, 146-47. As petitioner argued in the district court:

> [T]his is not a traditional arbitration. First, the arbitration was ordered by this Court . . . . Second, this is not the usual one or two day hearing settling some interpretation or application of a contract. Rather, it is an unprecedented four-way *interest* arbitration in which the arbitrator is charged with integrating the pilots of three different airlines . . . .

J.A. at 540-41 (emphasis in original).

Petitioner now seems to have forgotten both this critical distinction between grievance and interest arbitrations and the unique circumstances under which this case arose. Petitioner now seeks to treat this case as if it involved a routine grievance arbitration where the issue is whether a prior discharge arbitration as to Employee A constitutes an interpretation of the contract that binds a subsequent arbitrator charged with ruling on a grievance over the discharge of Employee B. This is not such a case. Here, one arbitrator's decision was made under one arbitration agreement, and the second arbitrator's decision was made under a separate arbitration agreement. There is no authority whatever for either arbitrator to rule upon or limit the issue presented to the other. Therefore, virtually all of petitioner's legal discussion is inapposite.

Petitioner cites several cases to the effect that it is for the arbitrator, not a court, to determine whether the dispute was intended to be covered by a prior arbitration award.[10] Pet. at 23-43. The district court properly found those cases to be inapposite. Pet. App. at 49a. Those cases involved collective bargaining agreements with broad arbitration clauses under which many disputes could be submitted for arbitration under the same agreement, sometimes years apart.[11] In the instant case, no collective bargaining agreement is involved. Neither the LPA nor the JPA contains a broad arbitration clause covering all disputes between the parties. Rather, they are situation-specific documents, each separately providing for *one*

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[10]Given that the Frontier pilots wanted Arbitrator Ross to free them from the outcome of the Nicolau Award, a more analogous line of cases would be those which observe that an arbitrator has no power to *overrule* a prior decision of another arbitrator. *See, e.g., Graphic Arts Int'l Union Local 97-B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088, 1096 (M.D. Pa. 1979).

[11]For example, in the "leading case" cited by petitioner, the two arbitrations occurred 25 years apart. Pet. at 24 (citing *Local 103, IUE v. RCA Corp.*, 516 F.2d 1336 (3d Cir. 1975)).

interest arbitration to each employee group affected by the September 15, 1986 transaction.[12]

Interest arbitration, by definition, is a one-time method for settling the rights of parties. For this reason, no arbitrator in the United States airline industry — in over 40 seniority integration arbitrations — ever has rearranged the relative seniority of two employee groups as integrated by an arbitrator from a *prior* airline merger. It is all the more unusual, therefore, that the petitioner should advocate allowing an arbitrator to rearrange the relative seniority of two employee groups as integrated by a prior arbitrator whose authority was a separate arbitration agreement dealing with the *same* transaction. There is no warrant for this Court's review.

II. The Third Circuit's Decision Is Not In Conflict With Decisions Of This Court Or Those Of Other Circuits.

Petitioner argues that the court of appeals created a conflict with this Court's decisions and the decisions of other lower federal courts by upholding the district court's determination to rule on the arbitrability issue itself, instead of reserving that issue for Arbitrator Ross. Pet. at 21-47. Assuming *arguendo* that the Third Circuit's judgment order has any precedential value at all (which it does not, *see supra* note 9), it is consistent with this Court's teachings and the law in other circuits.

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[12] *See* Elkouri & Elkouri, *supra*, at 225 ("Since collective agreements generally do not provide for the arbitration of 'interest' disputes that might arise in the future, the agreement to arbitrate such disputes most often is entered into after the dispute has materialized and at a time when the issues can be defined. In such cases the parties will use one instrument only, which will contain full provision for the arbitration.").

The starting point for determining arbitrability is whether the arbitration clause encompasses the present dispute. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 648 (1986). Under this Court's decisions, "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court," *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), and not by the arbitrator. *Accord AT&T*, 475 U.S. at 649.

In this case, the district court made a garden-variety application of this doctrine. It determined that Continental was bound to let the People Express pilots arbitrate their seniority integration because the LPA encompassed that dispute. Having permitted the Frontier pilots to intervene in the LPA arbitration on other grounds,[13] the district court then had to determine whether to bind them to their JPA arbitration or leave that question open for Arbitrator Ross.

Petitioner argues that because the LPA was silent on the issue of the effect of prior arbitrations,[14] the district court should have left the question open for Arbitrator Ross. Pet. at 26-28. This argument ignores petitioner's repeated statements, which were the predicate for intervention, that it

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[13]Petitioner suggests that the district court found that the Frontier pilots, like the People Express Pilots, were third-party beneficiaries of the LPA and that they were permitted to intervene on that basis. Pet. at 4-5, 7, 27. To the contrary, the Frontier pilots were permitted to intervene solely to protect their seniority as awarded under the JPA. At no time did the district court find that the LPA covered the seniority dispute between the Frontier and Continental pilots.

[14]It is not surprising that the LPA lacks a clause addressing the effect of prior arbitrations. As noted *supra* at note 12, the LPA is an interest arbitration agreement, which typically involves only *one* issue and *one* arbitration to resolve it.

would not challenge the effect of the prior JPA arbitration. Moreover, all of the evidence "show[s] that the parties intended the [JPA] to be their 'chosen instrument for the definitive settlement' of the dispute in this case" between the Continental and Frontier Pilots. *UMW v. Consolidation Coal Co.*, 666 F.2d 806, 810 (3d Cir. 1981) (citation omitted). There is no doubt that the JPA-based Nicolau Award was intended to cover the same dispute between the Frontier and Continental pilots that petitioner sought to rearbitrate before Arbitrator Ross,[15] and that petitioner sought resubmission of the dispute to Arbitrator Ross only because the Frontier pilots were dissatisfied with the earlier Nicolau Award. Thus, even under the line of collective bargaining cases cited by petitioner (which are inapposite), the district court properly refused to return the Continental-Frontier dispute to arbitration, since the district court could "say 'with positive assurance' that the [earlier] award or settlement was intended to cover the dispute." *Consolidation Coal*, 666 F.2d at 811 (referring to *United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 582-83 (1960)). *See also IAM v. Republic Airlines, Inc.*, 829 F.2d 658, 661 (8th Cir. 1987) (court denied union's action to compel second arbitration because "[i]n the present case, there is no identity of issues question. To the

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[15]Petitioner argues that the 1987 JPA arbitration did not present the same issues and facts that were involved in the 1990-1991 LPA arbitration. Pet. at 28-29 & n.3. Petitioner relies on the district court's observation that the issue *properly* before Arbitrator Ross (the integration of the People Express pilots into the combined Continental-Frontier list) was not the same as the issue before Arbitrator Nicolau. *Id.* at 29 n.3 (citing Pet. App. at 49a-50a). Petitioner's argument is specious. The issue that petitioner *sought* and *still seeks* to rearbitrate *is* identical to the issue that was before Arbitrator Nicolau: how the Frontier pilots should be ranked against the Continental pilots. Resolution of that issue involves the same two employee groups and arises out of the same September 15, 1986 transaction. The involvement of the People Express pilots in the instant litigation does not change the identity of the Continental-Frontier dispute that the Frontier Pilots want to rearbitrate; it merely adds additional employees who sought to arbitrate *their* seniority vis-a-vis the Continental pilots.

contrary, there is no question but that the 1984 grievances relate to the exact . . . provisions as are the subject of the present grievances."); *Butler Armco Indep. Union v. Armco Inc.*, 701 F.2d 253, 255 (3d Cir. 1983) (affirming district court's submission of dispute over seniority unit merger to arbitration because the party seeking arbitration "was not raising the same arguments in a situation that was 'materially the same' as prior arbitrations, and therefore, [the party] was not attempting to defeat its responsibilities under the previous decisions"); *Oil, Chem. & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044, 1055 (5th Cir. 1981) ("If it is beyond argument that there is no material difference between the current facts and the facts on which the prior arbitration award was based . . . [t]here would be no reason to submit the current dispute to arbitration.").

III. The District Court's Finding That Petitioner Was Not Prejudiced By The *Ex Parte* Communication Was Not Clearly Erroneous, And The Third Circuit's Affirmance Did Not Sanction A Departure From Accepted Judicial Procedure Or Create A Conflict Among The Circuits.

On the issue of the *ex parte* communication, the district court made a factual finding that the communication "clearly did not prejudice the Frontier Pilots so as to deprive them of 'a fundamentally fair hearing'." Pet. App. at 33a-34a (citation omitted). Petitioner has no evidence that the district court was clearly erroneous in making that factual finding. Instead, petitioner seeks a bright-line rule that *all ex parte* contacts with arbitrators, no matter how brief and inconsequential, should lead to vacation of arbitration awards. Pet. at 48-58. There is no call for an exercise of this Court's supervisory power to establish the rule sought by petitioner, especially where such a rule would interfere with the wide procedural discretion required by labor arbitrators to resolve workplace disputes and would require vacation of arbitral decisions even where no prejudice had arisen from an *ex parte* contact.

Moreover, Third Circuit law is consistent with the Ninth Circuit decision relied upon by petitioner as well as decisions of other lower federal courts on this issue. Where there has been no prejudice to the rights of a party, courts uniformly have refused to vacate arbitration awards involving *ex parte* contacts with an arbitrator.[16] *See Pacific & Arctic Ry. and Navig. Co. v. United Transp. Union*, 952 F.2d 1144, 1149 (9th Cir. 1991)[17]; *Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989); *National Bulk Carriers, Inc. v. Princess Mgmt. Co.*, 597 F.2d 819, 825 (2d Cir. 1979) (court refused to vacate award where, after two-month hearing and lengthy post-arbitration briefing, partial panel member communicated *ex parte* information to neutral arbitrator during deliberation phase; no prejudice occurred since the neutral testified that the communication occurred after his decision had been made); *M & A Elec. Power Coop. v. Local 702, IBEW*, 773 F. Supp. 1259, 1262-63 (E.D. Mo. 1991); *Springfield*

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[16]Petitioner cites two cases that are inapposite. Pet. at 49. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), merely holds that it was error for an arbitration panel to rely upon evidence not made available to one of the parties in order to assess damages against that party on an issue which was not submitted for arbitration. It was error, the court held, because it "constituted misbehavior by the arbitrators prejudicial to [the party's] rights in violation of 9 U.S.C.A. § 10(c)." *Id.* at 653.

United States Lines v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978), does not even involve arbitration, and it stands for the unsurprising proposition that *ex parte* communications to the Commission which "were employed both to introduce new arguments and positions and to respond to and rebut the arguments . . . made in . . . public filings," and which resulted in "the Commission squarely revers[ing] its position," violated the right of the *public* to participate in public hearings. *Id.* at 537-39.

[17]The facts surrounding the communication with Arbitrator Ross do not suggest even an appearance of impropriety and are in no way comparable to the egregious facts involved in *Pacific & Arctic Railway*, relied upon by petitioner. Pet. at 53.

Terminal Ry. v. United Transp. Union, 767 F. Supp. 333, 347-49 (D. Maine 1991) (*ex parte* communications aimed at acceleration of case or scheduling in general are viewed as less serious intrusions and require strong showing of prejudice to void arbitration award); *Konkar Maritime Enter., S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 275 n.9 (S.D.N.Y. 1987).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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